NO. 9344

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

MIGUEL ZAMORA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

Upon Appeal from the District Court for the District of Alaska, Division Number One.

WM. A. HOLZHEIMER,
United States Attorney.

GEORGE W. FOLTA,
Asst. United States Attorney,
For Appellee.

INDEX

Cases Cited

Page

Textbooks

Page

Statutes

Page

United States
Circuit Court of Appeals
For the Ninth Circuit

MIGUEL ZAMORA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

NO. 9344

BRIEF OF APPELLEE

This is an appeal from a judgment of the District Court of the United States for the Territory of Alaska, entered on a verdict returned against the appellant December 17, 1938, finding him guilty of arson by burning the dwelling house of another in Petersburg, Alaska, on April 8, 1938.

SCOPE OF ARGUMENT AND REVIEW AS AFFECTED BY THE CONDITION OF THE RECORD

Appellee feels obliged to call attention to what appears to be a somewhat reckless disregard for logic and legal principles in the preparation of appellant's brief and record on appeal. The bill of exceptions does not contain all the

testimony. In particular, testimony, the exclusion of which is assigned as error, as well as the exceptions to its exclusions, are omitted. All the assignments of error, except those relating to the denial of motions, the reviewability of which depends on a showing of an abuse of discretion, are based on the excluded evidence and exceptions which do not appear in the bill of exceptions. Inconceivable as it may be, evidence which has been excluded and the exclusion of which is assigned as error, is also argued in support of one point or another as though it were substantive evidence! (Tr. pp. 14, 15).

Notwithstanding the rule that in determining the sufficiency of evidence on appeal, the court will not weigh the evidence or pass upon the credibility of witnesses but will view the evidence of the prosecution, together with all inferences reasonably deducible therefrom, in the most favorable light, much of the argument is based on evidence of appellant, which at most merely presents a conflict, consideration of which is foreclosed by the verdict. Finally partiality and prejudice are imputed to the trial court without the slightest support in the record.

The false issues thus created adulterate the entire brief of appellant and divert attention from the real issues which are few. They are mavericks which require branding at the outset so that they may be identified on subsequent encounter.

QUESTIONS PRESENTED

Appellee contends that the only question presented, aside from those arising out of the denial of motions, is whether

the bill of exceptions is sufficient to entitle appellant to a consideration of the errors assigned. Of course, if the deficiency can be remedied, the following additional questions emerge from the record:

I. Did the court err in excluding evidence of a roof fire several days before the arson as tending to show a causal connection with the final fire in the bathroom on the ground floor?

II. Did the court err in excluding opinion evidence as to whether a chimney fire several days before the arson might explain the final fire and as to the possibility that the fire could have been caused by a spark smouldering in the walls?

III. Did the court err in excluding evidence of a previous statement inconsistent with testimony given by witness for prosecution, of whom the impeaching question had not been asked?

IV. Is the evidence sufficient to support the verdict?

STATEMENT OF THE CASE

About 1:45 a. m. of April 8, 1938, the dwelling house of John Silva at Petersburg, Alaska, was discovered to be afire and was completely destroyed.

Downstairs the house consisted of what is called the "front room," a bedroom, kitchen, and a storeroom called during the trial "bathroom" because it had once been a bathroom. Upstairs there were two bedrooms. The fire originated in this so-called bathroom which was accessible to

the remainder of the house by a door opening into the bedroom in which among others appellant's wife slept at the time of the fire. Before and at the time of the fire the one window in the exterior wall of the bathroom was open and accessible to the outside. There was no stove, chimney or electric wiring in that room. One concrete chimney between the kitchen and the frontroom served the stoves. Oil was used as fuel in the kitchen range and wood in the heater in the frontroom.

Appellant, a Filipino, had been a frequent caller at the Silva home to see his estranged wife. They quarreled so much he was finally denied admission to the house at about 4:00 p. m. of April 7th. An argument ensued between appellant and Silva who was working outdoors, during the course of which appellant threatened to kill someone in the house, that he would make the house suffer and everyone in it, that someday Silva would not see his house, that he, Silva, would find out what he was going to do to the house someday.

Upon the trial these threats were not denied or explained.

The fire in the kitchen range was shut off about 7:00 p. m., and the fire in the heater was out before the occupants went to bed at about 10:00 p. m. It was raining. During the night Alice Bassford was unable to sleep. She went to an outside toilet at about midnight. Thereafter, while lying awake in bed, she smelled gas, being familiar with its odor. A muffled explosion followed in the bathroom. The fire spread so rapidly that most of the occupants es-

caped in little more than their nightclothes, some of them in their bare feet. Immediately after the discovery of the fire, appellant was seen running away from the bathroom side of the Silva house by the witness, Mabel Jackson. Sometime later he became one of the spectators and even attempted to help the firemen.

At the first opportunity, Silva notified a fireman and policeman of the threats made by appellant. All three proceeded to appellant's room about a block from the fire. The policeman knocked on the door and getting no response, he pounded on the door until the lock was broken or became loosened. Upon entering appellant was found to be either asleep or simulating sleep and had to be turned over before he indicated he was awake.

Appellant was convicted on December 17, 1938, and on February 4, 1939, sentenced to twenty years' imprisonment.

The questions which appellant argues but which appellee contends find no basis in the bill of exceptions, relate to the exclusion of evidence and the denial of motions. During the progress of the trial a motion was made for a continuance to permit appellant to obtain a witness who had not been subpoenaed. The usual motion for a new trial was made after verdict, and more than three months after verdict, another motion for a new trial was filed based on allegedly newly discovered alibi evidence consisting of the testimony of two persons who claim to have been with the defendant from 10:00 p. m. to 1:00 a. m. the night of

the fire. All these motions were denied.

Appellant did not take the stand.

SUMMARY OF THE ARGUMENT

I.

The bill of exceptions does not contain testimony essential to a consideration of the errors assigned. Neither does it contain the exceptions to the exclusion of such evidence.

II.

Exclusion of evidence of fire on roof several days before arson charged in indictment was proper because irrelevant to any issue, particularly as to the cause of the fire in the bathroom on the ground floor with the setting of which appellant was charged. No promise was made to show a causal connection between the roof fire or the condition of the chimney and the fire now under consideration.

III.

Exclusion of opinion evidence as to cause of fires generally was not erroneous because no foundation had been laid for the admission of such testimony; the witness was not shown to be qualified and moreover the hypothetical questions did not embrace the facts testified to, were not framed to reflect any reasonable theory, and were wholly speculative and conjectural.

IV.

Appellant was not denied the right to impeach Mabel

Jackson, a witness for the prosecution. No foundation for any impeaching question having been laid when Mabel Jackson was on the stand, as provided by statute, the ruling of the court that the question asked appellant's wife tending to elicit evidence of previous inconsistent statements allegedly made by Mabel Jackson, was correct. No effort was made to recall Mabel Jackson for the purpose of putting the impeaching question to her.

V.

Evidence is sufficient to sustain the judgment. It shows:

1. Antecedent threats by appellant.
2. Motive.
3. Opportunity and ability.
4. That fire was incendiary.
5. That defendant was seen running away from the side of the house on which fire occurred immediately after the explosion which preceded the fire.
6. Conduct inconsistent with innocence.

VI.

Denial of motion for new trial is not assignable as error. No abuse of discretion is claimed and all the alleged errors upon which the motion was based are reiterated in the assignment of errors.

VII.

Denial of second motion for new trial filed more than three months after verdict was proper, because the evidence was not newly discovered and merely covered the period from 10:00 p. m. to a few minutes after 1:00 a. m. of the

night of the fire. Such testimony would not tend to establish an alibi, and was entirely consistent with that already introduced by the prosecution. Moreover, it was known and available to the appellant at all times.

VIII.

Denial of motion for continuance made during the progress of the trial to obtain a witness from Petersburg was not error because (1) it was not shown what, if any, evidence the witness would give, (2) the witness had been in Juneau and appellant had neglected to subpoena her, and (3) a continuance of even a week might have been inadequate owing to the infrequency of steamer sailings between the two ports.

ARGUMENT

I.

Bill of Exceptions Does Not Contain Testimony Essential to a Consideration of the Errors Assigned

Testimony, exclusion of which is assigned as error as well as exceptions to such exclusion, have not been incorporated in the bill of exceptions. This defect appears on its face. Thus the bill of exceptions, beginning on page 38 of the transcript, and ending, so far as the testimony is concerned, on page 80, expressly refers, on pages 72, 73 and 76, to omissions. True the evidence thus omitted appears in the assignment of errors (Tr. pp. 22-28) but it has not been authenticated and examination thereof will

disclose patent inaccuracies. The assignment of errors was served on appellee long before the bill of exceptions and it was not subjected to the process of examination, verification and correction preliminarily to its final settlement. Appellee assumed that all the evidence would be incorporated in the bill of exceptions, that it would have an opportunity to object to inaccuracies or omissions and that moreover it would be authenticated by the reporter's certificate in the first instance and ultimately by the court.

The rule that evidence and other matters not incorporated in the bill of exceptions, although appearing elsewhere in the transcript, are not open to consideration, is so well settled as to make the citation of authority superfluous. Directly in point are: *Clune v.* 159 *U. S.* 590, 593, and decisions of this court in *Lee Won Jeong v. U. S.* 145 *F* 512, 513; *Simms v. Douglass* 82 *F* (2) 812, 813, 814, 816; *Felder v. Reeth* 62 *F* (2) 730, 731; *Cummings v. U. S.* 15 *F* (2) 168, 169; *Beach v. U. S.* 35 *F* (2) 837; *Sprachlen v. Achinson T&SF Railway* 7 *F* (2) 468, 469. Moreover the rule is not affected by the circumstance that the judge certifies that the bill of exceptions contains all the evidence when it in fact does not. *City of Milwaukee v. Shailer* (*CCA-7*) 91 *F* 726, 727.

Appellee submits that the rule is squarely applicable to the case at bar and that its application precludes consideration of all the errors assigned except those relating to the denial of motions for a new trial and for a continuance.

II.

Evidence of Fire on Roof of House Several Days Before Arson Was Wholly Irrelevant

1. *No Offer Was Made to Show a Causal Connection Between Them*

The fire which destroyed Silva's home originated and for a time was confined to a storeroom referred to in the record as the bathroom (Tr. pp. 43, 50, 52). It had been cleaned out shortly before and contained tools and some clothing but no stove, electric wiring, chimney or lamps of any kind (Tr. pp. 43, 47). The character of its contents precludes the possibility of spontaneous combustion, particularly in view of the fact that it was ventilated by means of a window open to the outside before and at the time of the fire (Tr. pp. 43, 46, 50, 52). Moreover, this room was separated from the roof by the upstairs and attic. Under such circumstances, evidence of a fire on the roof several days before would be wholly irrelevant on the issue of the cause of the fire in bathroom on the ground floor. A roof fire presupposes a roof dry enough to ignite. Moreover, sparks from a neighboring chimney could account for it. Not only was the offer of the evidence silent as to such conditions, but the evidence already admitted showed that it was raining the night of the fire (Tr. p. 43) and that the fires in both stoves had been out for at least three hours (Tr. p. 46). It should be noted also that the odor of gasoline pervaded the house before the explosion in the bathroom which was immediately followed by the fire (Tr.

pp. 47, 50, 52). No reasonable conclusion can be drawn from these facts except that the fire in the bathroom was of incendiary origin and hence evidence of a roof fire several days previously would be entirely lacking in probative value.

As pointed out, the evidence excluded and the exceptions thereto were omitted from the bill of exceptions.

III.

Opinion Evidence as to Cause of Fires Generally and as to Possibility That Origin of Fire Was Accidental, Was Properly Excluded as Irrelevant, Speculative and Conjectural

1. *The Witness Was Not Shown To Be Qualified As Expert*

Appellant's witness, Mulvihill, was asked if he fought fires and read books on fire prevention (Tr. 30). An affirmative answer would not have had the slightest tendency to qualify him as an expert on any subject. Every fireman fights fires and reads literature on fire prevention, but it does not follow that he thereby becomes an expert on the origin or cause of fires. If it had been shown that the witness had had considerable experience in investigating and determining the cause of fires or had acquired technical knowledge thereof through study, it is conceded that he would be qualified to testify generally as to causes of fires. But such testimony would have been wholly irrelevant to any issue then before the court.

2. *The Hypothetical Questions Embraced Neither The*

Facts Already in Evidence Nor Facts Sufficient To Support Any Reasonable Theory

The questions asked were (Tr. pp. 31, 32):

"Would you say, Mr. Mulvihill, that a chimney fire occurring within a few days of an unexplained fire might offer an explanation of the cause of the fire?"

and

"Mr. Mulvihill, a building becoming ignited several hours after fires in both stoves had been extinguished—could such a fire be caused by the presence of a spark that was smouldering in the woodwork?"

The vice in the first question is that it assumes facts not in evidence, to-wit: (1) a chimney fire, (2) an unexplained fire, and moreover calls for pure conjecture. The second question assumes the presence of a spark in the woodwork and a smouldering thereof for several hours and is wholly speculative and indefinite.

While the theory of the defense appears to have been that the fire was accidental yet the questions were not only not framed to reflect that theory but bear no relationship to it; they are as alien to the theory as if they were based on the possibility of ignition by a meteorite. Obviously no burden rests on appellee to negative every remote and fantastic possibility.

If it were not intended that the questions should reflect any theory of the defendant, then they were clearly irrelevant and incompetent because they failed to embrace any of the essential facts which the evidence tended to establish,

viz: (1) odor of gasoline emanating from bathroom, (2) muffled explosion in bathroom followed immediately by fire, (3) that fire was at first wholly confined to the interior of the bathroom, (4) that there was no highly inflammable substance in the bathroom, and (5) that there was no stove, chimney or connection therewith, and no lamps.

A ghost appears on pages 14 and 15 of appellant's brief. Notwithstanding that the evidence now under discussion perished with its offer on the trial and that its exclusion is here assigned as error, it is there argued as substantive evidence! Appellee thinks that the brief ought to be purged of all mavericks and ghosts.

Much space is devoted in appellant's brief to the presumption of accidental origin of fires. Appellee concedes that the State of Washington has gone the limit in giving force to this presumption but submits that the weight of authority is that such presumption is rebutted when the fire is shown to be incendiary. 4 Am. Jur. 105, Sec. 22 Note 20; 6 C. J. S. 750, Sec. 29.

The questions were properly excluded because (1) the witness was not shown to be qualified; (2), they did not embrace the facts which the evidence already introduced tended to establish; (3), they were not framed to reflect any reasonable theory; (4), they assumed facts directly at variance with those already established by the evidence; (5), they had no bearing on any issue in the case, and (6), they called for purely speculative and conjectural answers. No one but an oracle could answer them.

Finally neither the testimony excluded nor the exceptions to its exclusion appear in the bill of exceptions.

IV.

Appellant Was Not Denied Right to Impeach Mabel Jackson

While appellant's wife was on the stand she was asked (Tr. p. 26) whether Mabel Jackson, witness for the prosecution, had not previously at the preliminary hearing, made a statement inconsistent with her testimony on the trial. Objection to the question was sustained.

An examination of Mabel Jackson's testimony (Tr. pp. 48, 49) will show that no foundation had been laid for her impeachment as required by Section 4257, Compiled Laws of Alaska, 1933:

> "A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of time, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them."

No attempt was made to recall Mabel Jackson for the purpose of putting the impeaching question to her.

Again the exclusion of this question, and the exceptions thereto are not in the bill of exceptions.

V.

Evidence Is Sufficient to Sustain Judgment

1. *Appellant Made Threats Against Silva's Home and Occupants Shortly Before the Fire*

Appellant's estranged wife lived with the Silvas. He called frequently to see her. Invariably they quarreled (Tr. pp. 41, 44) and Mrs. Silva would become excited and suffer heart attacks (Tr. p. 67). To prevent these, appellant was finally denied admission to the Silva home the day before the fire and told to stay away (Tr. p. 41). He thereupon threatened to kill someone in the house and to make the house suffer "and everyone in it". (Tr. p. 42). He also said, "You are very proud because you got a house. You will never see your house someday," (Tr. p. 42) and that Silva would "find out what he was going to do to the house some day" (Tr. p. 42). Both were angry.

2. *Fire Was of Incendiary Origin*

The threats were made about 4:00 p. m.; approximately ten hours later Silva's home was discovered to be afire and in a few hours was totally destroyed. There was a stove in the kitchen in which oil was used and a heater in the front or living room in which wood was used for fuel (Tr. p. 45). Both were served by a concrete chimney in the partition between the kitchen and frontroom (Tr. p. 45). In addition to these two rooms, there were a bedroom and the storeroom called the bathroom (Tr. p. 41). All these rooms were on the ground floor. Upstairs there were two bedrooms (Tr. p. 41) in which the Silvas slept (Tr. p. 42).

The bathroom had been cleaned out just previously to the fire. It contained nothing but Silva's tools and trolling lines (Tr. pp. 43, 47) and some clothing. It was not connected in any way with either stove or the chimney (Tr. p. 45) and there was no electric wiring in it (Tr. p. 47). For some time before and during the night of the fire, the window in the bathroom was kept open for ventilation (Tr. pp. 43, 50, 52) and this made the bathroom accessible from the outdoors. The door of the bathroom opened into the bedroom (Tr. pp. 43, 45).

The fire in the kitchen stove was shut off about 7:00 p. m. and that in the heater was out before the occupants retired at about 10:00 p. m. (Tr. pp. 43, 46, 47). Appellant's wife and baby, Mabel Jackson and Alice Bassford occupied the downstairs bedroom. Alice was unable to sleep. She was up for a few minutes at about midnight. Thereafter, she lay awake. Some time after 1 a. m. the odor of gasoline with which she was familiar alarmed her, (Tr. pp. 50, 52), and she awakened Mabel who also became aware of the odor (Tr. pp. 47, 49). Appellant's wife was then awakened and she and Alice immediately examined the stoves but found nothing to account for the odor (Tr. pp. 50, 65). There was a muffled explosion (Tr. p. 52) immediately followed by a fire in the bathroom. It was then confined entirely to the interior of the bathroom (Tr. pp. 43, 46). Silva was called immediately and he too smelled gas (Tr. p. 46). He threw two buckets of water into the bathroom, the only effect of which was to cause the fire to flare up to such an extent that his face was burned (Tr.

p. 43). This in itself strongly indicates the presence of some inflammable substance like gasoline. The fire spread so rapidly that the occupants ecaped in little more than their night clothes and bare feet (Tr. pp. 44, 47, 50, 51).

3. *Appellant Was Discovered Running Away From the Scene Immediately After Fire Broke Out*

Upon being awakened, Mabel Jackson ran to the front vestibule of the house, where she waited to take charge of the baby. While there, she saw the appellant running away from the bathroom side of the house (Tr. p. 48). A short time afterward, when she saw him again, he was approaching the scene of the fire (Tr. pp. 48, 49) where he mingled with the spectators for a while and then attempted to assist the firemen.

4. *Conduct Inconsistent With Innocence*

Silva's home was uninsured and unencumbered (Tr. p. 44). As he stood barefooted in the street watching it go up in flames, he remembered the threats and concluded that appellant had fired his house. Some time that morning Mabel Jackson informed Silva that she saw appellant running away from the house (Tr. p. 49). At the first opportunity, Silva reported his suspicions to policeman Fenn and a fireman (Tr. p. 44). At about 5:00 a. m. the three went to appellant's room which was about a block from Silva's home (Tr. pp. 47, 61). They called appellant but received no response. They then pounded on the door so violently that the lock became loosened, permitting them to open the door and enter. Fenn "hollered at appellant and he rolled

over and stretched," (Tr. pp. 44, 57, 60, 62).

Appellee contends that appellant simulated sleep and that such conduct is irreconcilable with any theory except that of a consciousness of guilt. He was a spectator at the fire only a short time before (Tr. p 44).

5. *Appellant's Ability to Commit the Arson Charged Is Not Disputed*

He was familiar with the interior arrangement of the house, undoubtedly knew where his wife and baby slept and that the door between the bathroom and bedroom was open. His ability to commit the crime is not disputed.

6. *Appellant Had the Opportunity*

Shortly after 1:00 a. m. appellant was seen a few blocks from the Silva home proceeding in its direction. However, it is but fair to point out that this was also in the direction of his room (Tr. p. 59). His movements between that time and the discovery of the fire thirty to forty-five minutes later were never accounted for.

7. *Motive Was Shown*

A reasonable inference from the evidence is that the appellant harbored a desire for revenge on the Silvas. While he might have obtained satisfaction in causing physical injury to Silva, it is not unreasonable to conclude that his animosity extended also to the building to which he had been denied admission.

Summarizing the evidence it shows: (1) antecedent threats to injure or destroy Silva's home and occupants, (2) motive, (3) ability, knowledge and opportunity, (4) incen-

diarism, (5) presence of accused at the scene of the crime immediately after discovery of the fire, (6) conduct inconsistent with innocence.

8. *Refutation*

Appellant's argument on the sufficiency of the evidence proceeds on the assumption that the fire was due to accidental or natural causes. In pursuing this postulate into all its possible ramifications, the argument is pushed over the brink of logic and into the realm of speculation. There appellant speculates on the possibility that the fire was caused by cigarette or match stubs, spontaneous combustion, explosion in feed pipes, smouldering sparks, defective wiring, gasoline lamps, oil lamps, candles, etc., and beckons us to follow. We refrain from doing so. There is not the slightest foundation in the record for such speculation, except that appellant's wife, who was discredited and impeached, testified to smoking in the kitchen and bedroom. Not only is appellee's evidence to the contrary, but it must be borne in mind that the fire was in the bathroom.

Since one may find authorities to support any thesis or postulate, it follows that the value of those cited by appellant depends on the soundness of the postulate. Superficial analysis reveals its unsoundness. It necessarily follows that the cases cited are not point, and no discussion will be indulged in as to them.

Complaint is made that the prosecution failed to prove that appellant bought gasoline or that oil soaked rags or papers or a gasoline container were found. The answer

is that a few hours after the fire, the ashes of Silva's home were scattered over the waters of Petersburg harbor. Notwithstanding that the quantum and kind of proof introduced by the prosecution never satisfies the defense, the test is not whether particular evidence is absent, but whether, such as it is, it is sufficient to sustain the judgment.

An effort is made to explain the conduct of appellant when apprehended in his room by the claim that his sense of hearing was impaired. But the evidence of the prosecution is that his hearing was normal (Tr. pp. 78, 79). On page 22 of appellant's brief, it is said that the witness Fenn saw appellant about the time the fire started, whereas Fenn testified that it was at least a half hour after he saw appellant that he went to the city float (Tr. p. 61); that when he first looked over the waterfront from the float, there was no indication of a fire, but that when he looked the second time, the fire was visible (Tr. pp. 59, 60).

Likewise an attempt is made to explain away the threats made by appellant by ascribing an innocuous meaning to the threat "Some day you won't have no home, then you won't be so proud." This is *selected* from the testimony of Grainier who heard only a part of the threats. Nevertheless, he also testified that he heard appellant say he would "get" someone in the house (Tr. pp. 53, 55). As pointed out, other threats were made to Silva (Tr. p. 42) which cannot be interpreted to mean anything but that injury or destruction to the house and to someone in it was contemplated. They are not susceptible of any other reason-

able interpretation or explanation; indeed, no explanation or denial was made on the trial.

The point is made that appellant would not have set fire to a building in which his wife and child slept. Criminals have often been acquitted because juries have reasoned that if the motive were not powerful enough to impel them to commit the crime, it likewise could not have induced the accused. This is fallacious. The ultimate test is not whether the motive was powerful enough to induce any juror or other person to commit the offense, but whether it would or did induce the accused. In the case at bar, the jury had ample opportunity to observe the appellant and to judge of *his* susceptibility to the temptation to secure revenge by arson. Moreover, appellant was familiar with the interior arrangement of the house and knew where the occupants slept. Obviously a fire in a bedroom on the ground floor is the safest place in which to have a fire, for its discovery is quite certain before escape is cut off. In the case at bar, the fire in a sense was in the bedroom for the bathroom door was left open for ventilation. The rear and front doors made escape easy.

Finally, the conviction is attributed to "racial prejudice, engendered and fed by the rulings of the court and the manner in which they were made." The recklessness of this ugly imputation is attested by the fact that the record is entirely barren of any evidence or exceptions to support it. Apparent impatience in dealing with incompetent questions and positiveness in ruling do not metamorphose into

partiality or prejudice because they happen to be adverse, even though they also be erroneous. A trial judge does not have to affect graciousness or be a paragon of diplomacy when he ascends the bench. Likewise he does not have to be mealy-mouthed to avoid incurring the risk of attacks such as this. That his manner may be positive or emphatic is no indicia of partiality. The rulings complained of are before the court on this appeal. But the conduct of the trial court is not open to consideration. The brief should be stricken from the files as scandalous.

VI.

Denial of Motion for New Trial Is Not Reviewable

The denial of the motion for new trial is not assignable as error. No abuse of discretion is claimed and all the alleged errors upon which the motion was predicated are now before the court on appeal.

VII.

Denial of Second Motion for New Trial

The so-called motion to "reopen motion for new trial," is in reality a second motion for a new trial (Tr. p. 8). It is not filed within the time required by statute nor is the filing of a second motion for a new trial authorized. It is based on an allegation of newly discovered evidence which it is declared would tend to establish an alibi. It appears that two persons were found who indicated their willingness to testify that they played cards with appellant

from about 10 p. m. to 1 a. m., when the pool or beer hall was closed, and they separated. Obviously, this falls far short of establishing an alibi. The appellant's whereabouts before 1 a. m. is wholly immaterial. Such evidence, if it had been received, would not only be entirely consistent with the evidence of appellee but would not tend to prove or disprove any issue in the case. Section 5374, Compiled Laws of Alaska, 1933, provides that a motion for new trial should be filed within six days after the rendition of the verdict. This motion was not filed until more than three months after the verdict. Moreover, Section 5373, Compiled Laws of Alaska, 1933, enumerating the grounds upon which a motion for a new trial may be made, provides:

> "Fourth. Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at the trial."

It appears from the motion and supporting affidavits (Tr. pp. 8-14) that the alleged newly discovered evidence was known to and available to appellant at all times. Its discovery did not involve the exercise of any diligence whatever. It could have been produced at the trial and if it had been deemed important, it certainly would have been included as one of the grounds of the first motion for a new trial.

8. DENIAL OF MOTION FOR CONTINUANCE DURING TRIAL WAS NOT ERROR

During the progress of the trial, appellant moved for a

continuance to obtain the attendance of a witness from Petersburg. The witness had been in Juneau but appellant neglected to subpoena her before she departed for her home. Owing to infrequent steamer sailings, a continuance of a week might have been inadequate. Not only did the appellant fail to use due diligence, but he failed to exercise any diligence to procure the attendance of the witness.

Moreover no affidavit setting forth the evidence of the witness was filed. Such a step is prerequisite to the granting of a continuance even before trial. Section 5298, Compiled Laws of Alaska, 1933. There is no statutory authority for a continuance during the progress of a trial, but it is conceded that the court has discretionary authority.

CONCLUSION

The errors assigned are not reviewable because they are not based on any exceptions in the bill of exceptions. The denial of the second motion for a new trial and the motion for a continuance, was within the discretion of the court. The denial of the first motion for a new trial is not assignable as error.

The judgment ought to be affirmed not only for the foregoing reasons but because no error was committed in the exclusion of evidence, and the evidence is amply sufficient to support the verdict. It shows antecedent threats evincing a desire for revenge; that the fire was incendiary; that appellant not only had the ability, opportunity, knowledge, and a motive, but that he was seen running away from the premises immediately after the explosion which preceded the fire. It also shows subsequent conduct on his part inconsistent with innocence.

Respectfully submitted,

WM. A. HOLZHEIMER,
United States Attorney.

GEORGE W. FOLTA,
Asst. United States Attorney.